

February 28, 2006 U.S. Mission to the EU W/R Update

As the July 2006 RoHS deadline draws closer, WEEE/RoHS issues continue to demand the close attention of the US Mission to the EU. This update summarizes the information from a number of sources, including the recent TAC meeting, a WEEE conference in France and information from other U.S. posts in Europe.

WEEE

- Registration

The situation with regards to the possibility for foreign companies to register in an EU country is improving, albeit slowly. This is still the single biggest WEEE issue for the US companies that we have been in contact with. In many Member States, an American producer either have to have their business customers register for them (in the case of B2B sales), or their re-seller or distributor (in the case of B2C sales). There are four main problems with this type of approach:

1. It can be construed as contrary to the Treaty freedoms, since in many cases the same problem applies not “foreign”, but European, companies (whether of American parentage or not) as it does to US-based companies.
2. Some US companies would prefer to register themselves for accounting and business model reasons, rather than farming this out to others.
3. Many US companies sell direct to consumers without going through distributors or re-sellers. For such companies, it is impossible to register in many countries, despite bona fide motives.
4. The WEEE Directive draws a distinction between household and non-household *waste*, and not between business-to-consumer or business-to-business *sales*. This difference is significant, since a sale to a business (e.g. corporate-branded electronic toys) can end up in household waste.

Many Member States have now recognized the problem, and are taking steps to address it. In particular, Portugal is working towards a solution that will allow US companies to register. The Hungarian Environment Ministry has expressed an interest in learning from such a solution, and others could follow suit. Some Member States do allow foreign companies to register (e.g. Germany), so we feel that this is a problem that can be fixed quickly if Member States work together effectively. We will be examining what we can do in this regard.

We have also heard from the German national WEEE register that they are currently besieged with contacts from companies blowing the whistle on competitors who have not yet registered. This use of WEEE/RoHS compliance as a competitive weapon is worth being aware of.

- Harmonization of Registers

At a workshop hosted by INSEAD in France on February 23, we were pleased to see that some Member State WEEE registers want to form the core of a group that will make a drive for pan-EU register harmonization. Ireland has offered to host a meeting of national registers, and Portugal has proposed that such a grouping become at least a semi-formal one. Early targets for harmonization would be information requirements and application forms, so that companies can fill them out even if they do not know the language of that country. This process is at an embryonic stage, but we will do what we can to support it.

- Take-back schemes and service providers

At the INSEAD event, presentations were made by take-back schemes. These are a growing and diverse group – some act as the national registers in their Member States, some facilitate registration from the “outside”, including providing solutions for foreign companies, and some have a purely take-back focused role. But the WEEE Forum, which is the umbrella organization for a

large number of the schemes, was keen to position itself as a good interface with national registers. Interestingly, the WEEE Forum is seeking to define for itself a WEEE service provision role (for remuneration) that would take it beyond an umbrella organization function and into income-building territory. Other service providers made presentations. These service providers can handle take back responsibilities but not necessarily registration requirements.

- Definition of “producer”

This continues to be a key issue for US companies in the context of both WEEE and RoHS. The fundamental problem is that for any one product, several different companies can be the producer. This creates uncertainty and may give rise to expensive legal battles. Given the lack of clarity, companies are urged to clearly outline WEEE registration and financial responsibilities in their contracts with their importers or distributors.

- Competition concerns relating to WEEE services

We have anecdotal evidence that some competition problems are arising in the new market for WEEE services. In particular, we are watching developments among European distributors, who may be working too closely together in determining common approaches to providing outsourced WEEE registration & take-back obligations management services for foreign companies unwilling or unable to register or meet their obligations themselves in a national market or a series of national markets.

- Pan-EU recycling

One of the more frequent questions we are getting from US companies concerns the possibility of concluding pan-EU recycling contracts with European recyclers (when not meeting obligations through a collective scheme). We are not aware of any recycling service that can be accurately described as pan-EU, but we are aware of a number of solutions and solution providers that can provide companies with take-back and recycling services across a number of Member States.

RoHS

- Hex chrome exemption

The Commission and the TAC have not yet made a decision on this exemption which was requested in late 2004 (on which the stakeholder consultation closed in early February 2005). This is an issue of great concern for US manufacturers, and we understand that it is equally difficult for players in other countries. We are lobbying for this exemption.

- Other exemptions

The TAC met on 15 Feb, and voted on a series of exemption requests by industry. The exemptions adopted are as follows:

16. Lead in linear incandescent lamps with silicate coated tubes.

17. Lead halide as radiant agent in High Density Discharge (HID) lamps used for professional reprography applications.

18. Lead as activator in the fluorescent powder (1% lead by weight or less) of discharge lamps when used as tanning lamps containing phosphors such as BSP (BaSi₂O₅:Pb) as well as when used as speciality lamps for diazo-printing reprography, lithography, insect traps, photochemical and curing processes containing phosphors such as SMS ((Sr,Ba)₂MgSi₂O₇:Pb).

19. Lead with PbBiSn-Hg and PbInSn-Hg in specific compositions as main amalgam and with PbSn-Hg as auxiliary amalgam in very compact Energy Saving Lamps (ESL).

20. Lead oxide in glass used for bonding front and rear substrates of flat fluorescent lamps used for Liquid Crystal Displays (LCD).

The last of the series initially put on the table by the Commission was withdrawn before a vote was taken, because the Commission did not believe it would get a majority in TAC. The text of the withdrawn exemption is as follows:

21. Lead in printed circuit boards, actuators, sensors, motors, power supplies, bearings, optical glass and wiring harnesses, and hexavalent chromium in sheet metal for mainframes, subframes, rollers, bracketry and associated hardware, which have been recovered from waste or used production printers and copying equipment returned from professional users other than private households, and have been originally put on the market before 1 July 2006, and traceably reused for the same purpose within the original manufacturer's closed loop system. The existence and reliability of the closed loop system shall be demonstrated via third party certification.

- RoHS enforcement

The UK hosted a meeting of RoHS enforcement parties from the Member States on Friday 27 Jan. According to our information, there was good progress on a common approach to enforcement issues. Member States discussed enforcement at the February 15 TAC meeting. We have reason to hope that progress can be made quickly and that informal, non-binding guidelines will in fact be published in late March or early April. These should give companies more confidence on the processes involved.

Many companies have been asking about penalties applicable if they are found in breach of RoHS rules in a Member State. While we have not done a thorough survey, we are aware of at least two countries where jail sentences are provided for in legislation (Sweden and Belgium). Fines will vary greatly: from 3-digit to 7-digit sums (in Euros), depending on the severity of the breach and the country that identifies it.

- "Put on the market"

The precise definition of "put on the market" for the purposes of RoHS enforcement continues to be one of the top issues of concern among US companies. The gulf dividing partisans of the Commission's approach, as defined in their FAQ (products must be compliant when first passing through EU customs), and the more activist approach of the Belgian and Latvian governments (products must be compliant when on the shelf), remains as wide as ever. While in theory RoHS implementation should be done consistently across Europe (because RoHS is an internal market Directive), we do not currently see an early solution to the problem coming from the Commission.

- Categories 8 & 9

The TAC agreed on 15 February that a public workshop on a possible inclusion of Categories 8 & 9 in the RoHS Directive will be held in Brussels on 26 April 2006. ERA Technology will present their interim report on the subject, and stakeholders will be invited to participate actively. The ERA report will be finalized and published by July 2006, and then subjected to a consultation, before an impact assessment is done on legislative options. Inclusion is not currently thought likely to take effect until 2009 at the earliest.

- Definition of "producer"

The definition of "producer" is not only problematic in the context of WEEE implementation, but also because in many Member States, WEEE and RoHS implementation will be linked. We believe, for example, that Ireland will require companies registering for WEEE to declare that the products

they place on the market are RoHS-compliant. In many cases, of course, the company registering will not be the manufacturer itself, and any declaration will have dubious value.